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BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202 638 3307
FACSIMILE 202 783 8947

KARI MORELL

kmorell@bjllp.com

November 12, 2008

E-FILE

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street S.W
Washington, DC 20423

Re: STB Docket No. AB-1020X, East Penn Railroad, LLC – Abandonment
Exemption – In Berks and Montgomery Counties, Pennsylvania

Dear Acting Secretary Quinlan:

Attached for e-filing is the Response of East Penn Railroad, LLC to the Petition
For Leave To Supplement the Record.

If you have any questions, please call me.

Sincerely,



Karl Morell

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1020X

**EAST PENN RAILROAD, LLC
--ABANDONMENT EXEMPTION--
IN BERKS AND MONTGOMERY COUNTIES, PA**

**RESPONSE TO PETITION FOR LEAVE TO SUPPLEMENT THE RECORD, VALUATION
UPDATE, AND REQUEST TO TAKE OFFICIAL NOTICE**

**Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307**

**Attorney for:
East Penn Railroad, LLC**

Dated: November 12, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-1020X

EAST PENN RAILROAD, LLC
--ABANDONMENT EXEMPTION--
IN BERKS AND MONTGOMERY COUNTIES, PA

RESPONSE TO PETITION FOR LEAVE TO SUPPLEMENT THE RECORD, VALUATION
UPDATE, AND REQUEST TO TAKE OFFICIAL NOTICE

East Penn Railroad, LLC ("ESPN") hereby responds in opposition to the Petition For Leave To Supplement The Record, Valuation Update, and Request To Take Official Notice ("Petition") filed by Berks County ("County"), on November 10, 2008. As is demonstrated below, the Petition is deficient in several respects and, accordingly, should be summarily rejected or denied.

Relying on the Board's decision in *Oregon International Port of Coos Bay – Feeder Line Application – Coos Bay Line of the Central Oregon & Pacific Railroad, Inc* (not printed), served October 31, 2008 ("*Coos Bay*"), the County seeks to introduce into the record new salvage value evidence on the eve of the Board's decision in this proceeding. *Coos Bay*, however, is inapposite in several significant respects. First, *Coos Bay* is a feeder line proceeding which does not have the strict statutory deadlines imposed on abandonment proceedings. Consequently, in feeder line cases, the Board can, in appropriate situations, bifurcate the proceeding and request evidence of the net liquidation value ("NLV") of the line as of the date of the decision with the evidence submitted after granting the feeder line application. The Board does not enjoy the same luxury in abandonment cases. The Board does not have the flexibility of seeking post-decision evidence

as to what the actual NLV was on the date of the decision. Selecting valuations as of November 7th, as the County has elected to do, is arbitrary. The Board has no way of knowing on the decision date whether those values remained constant or increased.

Second, the two salvage bids introduced into evidence in *Coos Bay* where not firm bids because the offerors reserved the right to revise their offers if there is a substantial change in the market. ESPN, on the other hand, has a binding contract with The Tie Yard of Omaha ("TYO").¹ A copy of the Salvage Agreement is attached as Exhibit 1. TYO is contractually obligated to pay ESPN \$1,082,000 for the rail, ties and other track materials on the line being abandoned. The Salvage Agreement cannot be modified or revised unless an offer of financial assistance is filed and approved in which event the Salvage Agreement becomes void. Under the Salvage Agreement, TYO assumed the risk of prices going down and ESPN assumed the risk of prices going up. Accordingly, the Board should accept the net salvage price set forth in the Salvage Agreement as convincing evidence of the fair market value of the line. See STB Docket No. AB-398 (Sub-No. 7X), *San Joaquin Valley Railroad Company – Abandonment Exemption – In Tulare County, CA* (not printed), served August 26, 2008; Docket No. AB-6 (Sub-No. 357X), *Burlington Northern Railroad Company – Abandonment Exemption – In King County, WA* (not printed), served April 22, 1994. The Board's predecessor noted that a property owner, such as ESPN, is entitled to the minimum value of the property guaranteed by the taking clause of the Constitution and that forcing a sale at a price substantially less than the railroad would receive under an "executed, arms-length sale contract" would run afoul of the rail transportation policy.

¹ The County claims that the salvage bid provided to the County in discovery suffers from the same flaws as the offers in *Coos Bay*. The County, however, confuses the salvage bid with the Salvage Agreement. The Salvage Agreement memorializes the acceptance of the salvage bid and establishes the rights and obligations of the parties.

Docket No. AB-225 (Sub-No. 2X), *Portland Traction Company – Abandonment Exemption – In Multnomah and Clackamas Counties, OR* (not printed), served January 10, 1990.

To the extent the County had the right to provide updated NLV evidence in this proceeding, it slept on that right. According to the County, on September 26, 2008, the price of scrap steel had dropped to \$277 per net ton. Since that date, the County has made two filings in this proceeding: on October 7, 2008 and on October 16, 2008. In neither of those filings did the County seek to introduce updated NLV evidence even though, according to the Petition, scrap prices had already dropped dramatically by September 26th. Rather than seeking leave to update the NLV values in a timely manner, the County waited until the very end of the proceeding in an apparent attempt to deprive ESPN of any meaningful opportunity to respond. Such procedural gamesmanship is best rewarded by summarily rejecting the Petition as intentionally tardy.

According to the County, the Board accepts supplemental evidence when the following three factors are met: (1) the proffered evidence must be central to the proponent's case; (2) the proffered evidence could not have reasonably been introduced earlier; and (3) the proffered evidence must materially influence the outcome of the proceeding. Petition at 5. The County, however, fails to satisfy even one of these factors.

First, the County's own evidence in this proceeding demonstrates that the line suffers an operating loss. Also, there are no longer any rail shippers located along the line and not one actual customer opposes the abandonment. Consequently, opportunity costs and subsidy payments, which are based largely on NLV, play only a very limited role since there is no need to balance the financial losses of ESPN against the harm to customers and there is no customer to subsidize continued operations. Unlike *Coos Bay*, where NLV plays a central role in the case, here NLV is only peripheral.

Second, as previously noted, the County could have presented evidence of declining scrap prices at least since September 26th. In *Coos Bay*, the Oregon International Port of Coos Bay submitted updated valuations on October 17th. In this proceeding, the County waited an additional 24 days before filing for leave to update the NLV evidence in an apparent attempt to deny ESPN a meaningful opportunity to respond.

Third, the proffered evidence also does not materially influence the outcome of this proceeding. The County's evidence of record continues to show that ESPN experienced an operating loss of \$19,099 in 2007, and has significant opportunity costs.² Also, the County has failed to introduce any evidence of countervailing harm to a single shipper. In other words, the County's own evidence, even if supplemented by the Petition, is more than sufficient to warrant the granting of the requested abandonment. Indeed, rarely, if ever, has an opponent of a proposed abandonment submitted such compelling evidence for the approval of the abandonment.

Finally, the Verified Valuation Update of Gary E. Landrio is suspect in at least two respects. First, Mr. Landrio asks the Board to accept the November 7, 2007 American Metals Market ("AMM") prices for steel. But Mr. Landrio fails to attach a copy of the AMM publication from which one could verify the prices. While the Board has relied on AMM prices in some proceedings, it has done so only after one of the parties has actually introduced a copy of the AMM publication into the record. ESPN is unaware of any instance where the Board or its predecessor took official notice of the AMM publication without it first being supplied by a

² As ESPN has previously demonstrated, the operating loss and opportunity costs calculated by the County are significantly understated.

party.³ Second, Mr. Landrio attempts to introduce into the record wholly new valuations for the ties. Mr. Landrio does not state whether prices for ties have gone up or down since the filing of the County's Protest so as to justify the updating of this evidence.

In summary, after significantly lowering the prices for steel, providing wholly new prices for ties, and recognizing his previous error of including bridge removal and crossing restoration costs, Mr. Landrio comes to the conclusion that the NLV is actually \$229,485 **higher** than in the Protest, the Opportunity Costs are \$34,377 **higher** than in the Protest, and the Estimated Subsidy is \$34,376 **higher** than in the Protest.

For all of the foregoing reasons, the Board should summarily reject or deny the Petition.

Respectfully submitted,



Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Dated: November 12, 2008

³ Pursuant to Rule 201(d) of the Federal Rules of Evidence, a court can only take judicial notice if supplied with the necessary information. 28 U.S.C. Rule 201(d). Also, AMM prices are generally not the best evidence in NLV calculations because there are a number of factors that go into actual salvage bids.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been served on Counsel for Berks County, PA, by hand delivery this 12th day of November 2008.


Karl Morell

SALVAGE AGREEMENT

THIS SALVAGE AGREEMENT ("Agreement") entered into this 31 day of July, 2008, between EAST PENN RAILROAD, L.L.C. ("ESPN"), and The Tie Yard of Omaha ("TYO").

WITNESSETH:

WHEREAS, ESPN will abandon a certain rail line in the State of Pennsylvania and desires to have the rail, ties, spikes, plates, joint bars, turnouts, OTM and related structures (excluding the bridges, culverts and ballast)(the "Assets") removed from the right-of-way and siding so abandoned; and

WHEREAS, ESPN desires to sell said rail and other Assets so removed; and

WHEREAS, TYO is in the business of salvaging rail lines and purchasing rail and other materials removed from right-of-way and sidings; and

WHEREAS, TYO desires to provide those services for ESPN.

WHEREAS, ESPN owns a rail line between milepost 0.0 near Pottstown, Pennsylvania and milepost 8.6 near Boyertown, Pennsylvania and can provide TYO access to said rail line without any third party claim of ownership or interest.

NOW THEREFORE, in consideration of the premises and the covenants contained in this Agreement, the Parties agree as follows:

Section 1. Scope of Work.

1.1. Salvage. Pursuant to the specifications contained in the attached Exhibit A, which is made a part of the Agreement by this reference, TYO shall remove and salvage the Assets from the following line segment: between milepost 0.0 in Pottstown, Pennsylvania and milepost 8.6 in Boyertown, Pennsylvania, a distance of approximately 8.6 miles (the "Line"). Any sidings appurtenant to the Line are included within the description of the Line.

1.2. Permits, Fees, and Notices. TYO shall secure and pay for any permits and licenses necessary for the proper execution and completion of its work under this Agreement. TYO shall also give all notices and comply with all laws, ordinances, rules, regulations, and orders of any public authority relating to this work.

1.3. Utilities. TYO is responsible for establishing and maintaining contacts with all utility companies before commencing any of the work provided for in this Agreement to ensure that the work does not interfere with or disrupt the provision of any utility services. No work in the vicinity of or that may affect a utility shall be started without the approval of the President of East Penn Railroad, LLC. If it is determined that the work may interfere with the operation of a utility, TYO shall provide whatever advance notice of such interruption as may be required by law, regulation or ordinance or by the utility company. TYO shall promptly report any damage to utility lines caused by and to the utility or agency

affected. TYO shall comply with the instructions of the utility company or agency and shall pay all expenses of repair in connection with such damages.

1.4. Access Roads. TYO shall, at its own expense, make all arrangements with local authorities, operating departments, parks officials, railway officials, highway officials, utility and service companies, and other such companies for access, detours, crossings, traffic control, and similar requirements relating to the performance of the work and it shall comply with their requirements and regulations. TYO is responsible for upkeep of access roads constructed by TYO and snow removal from such access roads at its expense.

1.5. Performance of Work. TYO shall furnish the necessary materials, superintendence, labor, tools, equipment, and transportation and shall expeditiously perform and complete the work covered by this Agreement in a good and workmanlike manner and in accordance with the attached Exhibit A and standard customs and procedures in the railroad industry. TYO is responsible for all means, methods, techniques, sequences, and procedures and for coordinating all portions of the work described in Exhibit A.

1.6. Right to Control Employees. TYO shall have the exclusive right and duty to control the work of its employees. All persons employed by TYO or any of its subcontractors in the performance of this Agreement shall be the sole employees of TYO or its subcontractors.

Section 2. Payments.

2.1. Amount. TYO shall pay ESPN a total of one million eighty-two dollars (\$1,082,000.00) for the Assets.

2.2. Payment. TYO will pay ESPN the amount set forth in Section 2.1 in accordance to the payment schedule outlined in the cover letter beginning from the date ESPN provides TYO with a notice to proceed ("Notice"), i.e., three equal installments with the first due upon TYO's receipt of notice to proceed, the second due forty-five (45) days later and the third forty-five (45) days after the second. The Notice will be given following abandonment approval by the Surface Transportation Board.

2.3. Offer of Financial Assistance. If the Surface Transportation Board requires the sale of the Line under the Offer of Financial Assistance provisions of 49 U.S.C. 10904, this Agreement will become void, if the offering party closes on the purchase.

Section 3. Taxes.

TYO shall pay any and all taxes arising from its work under this Agreement (including but not limited to any sales or use taxes but excluding any property taxes that may be owed by ESPN), levies, duties or charges of whatsoever nature or kind payable by TYO arising out of or in connection with this Agreement. TYO shall comply with the laws of the State of Pennsylvania concerning sales tax or any other applicable taxes.

Section 4. Time for Performing Work.

4.1. Commencement of Salvage Work. The salvage work on the Line shall commence within thirty (30) days of the date ESPN provides TYO with a notice to proceed unless TYO is prevented from commencing said work because of an act of Force Majeure as defined in this Agreement. TYO will remove and repair all road crossings within one hundred eighty (180) days of the time the Assets are removed from any such crossing. If TYO is delayed in the performance of its work by an event of Force Majeure as defined in Section 5 below, it shall notify ESPN of that event of Force Majeure as therein provided and TYO's performance obligations under this Agreement will be extended one day for each day the Force Majeure event persists.

4.2. Progress of Work. TYO shall conduct all work with sufficient forces and equipment that shall, in the judgment of ESPN, allow TYO to complete the work, within eighteen (18) months following the receipt of the Notice.

4.3. Time of the Essence. If TYO refuses or fails to prosecute the work with such diligence as will ensure its completion of the salvage operation provided for in this Agreement or if TYO abandons the work, TYO shall be liable for any and all direct losses, costs or damages of any type that ESPN may sustain or incur because of such refusal or abandonment, in addition to any other remedies it may have. Failure by TYO to timely complete the work specified in this Agreement shall not relieve TYO of its obligation to make the payment set forth in Section 2.1 above by the date set forth in Section 2.2 above.

4.4. Performance Bond. TYO will provide ESPN with a performance bond guaranteeing TYO's performance of its obligations pursuant to this Agreement. TYO's performance of its obligations is subject to the conditions set forth in Section 4.1 above.

4.5. Use of ESPN Property. At no cost to TYO, TYO may use ESPN's property adjacent to the ESPN's right-of-way at a location agreed to in writing by the parties to stage equipment and stockpile materials during the salvage of the Line. TYO shall vacate the premises, within one year immediately following the time of completion of the work provided for in this Agreement and shall restore the property to the condition in which it found it at no cost to ESPN. TYO shall bear the risk of loss concerning all materials, supplies, and equipment so staged or stockpiled.

Section 5. Force Majeure.

In the event TYO is unable, due to acts of God, including but not limited to flood, earthquake, hurricane, tornado or other severe weather or climatic conditions; acts of a public enemy, war, blockade, insurrection, vandalism or sabotage; governmental law, order or regulation to fulfill its obligations under this Agreement, then the time allowed for performance shall be extended automatically by a period of time equal to the period of delay or inability to perform so long as TYO promptly notifies ESPN in writing of occurrence, details the steps it is taking to eliminate the failure to perform, and states the expected time for such correction and pursues those steps with all due diligence.

Section 6. Compliance with Laws.

TYO shall give all notices required by and comply with all laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of the work described in this Agreement. TYO hereby indemnifies, holds harmless, and will defend ESPN and its affiliates, members, managers, managers, employees, agents, and invitees from and against any loss, cost, damage or expense (including reasonable attorneys' fees) arising from, occasioned by or in any manner connected with violations by or due to the work performed by TYO of any such laws, ordinances, rules, regulations or orders.

Section 7. Release, Indemnification, and Assumption of Responsibility.

7.1. Release of ESPN. TYO hereby releases ESPN and its affiliates, members, managers, employees, agents and affiliates from any claims arising from the performance of this Agreement that TYO or any of its employees, subcontractors, agents or invitees could otherwise assert against ESPN and its affiliates, members, managers, employees, agents, affiliates, and invitees regardless of the negligence of ESPN and its affiliates, members, managers, employees, agents, and invitees, except to the extent that such claims are proximately caused by the intentional misconduct or gross negligence of ESPN.

7.2. Duty to Indemnify, Defend, and Hold Harmless. TYO shall indemnify, defend, and hold harmless ESPN and its affiliates, members, managers, employees, agents or invitees for all judgments, awards, claims, demands, cost, expenses (including expert fees and reasonable attorneys' fees), for injury or death to all persons, including ESPN's and TYO's officers, affiliates, directors, members, managers, agents, employees, and invitees and for loss and damage to property belonging to any person, arising in any manner from or in connection with or arising from TYO's or any of TYO's subcontractors, agents, employees or invitees acts or omissions or any failure to perform any obligation under this Agreement, except to the extent that such claims, demands or judgments are proximately caused by the intentional misconduct or gross negligence of ESPN.

7.3. Assumption of Responsibility. Upon receipt of a notice to proceed, TYO assumes all responsibility for loss of or damage to the Assets and to materials and property of TYO until ESPN accepts the work. ESPN represents and warrants that the condition of the abandoned line to be salvaged will remain in the same condition at the time ESPN issues the notice to proceed as it was at the time of TYO's inspection in June of 2008. TYO shall indemnify, defend, and hold harmless ESPN and its affiliates, members, managers, employees, agents, and invitees from and against any liability for loss of or damage to the materials and property of any subcontractor used in the performance of the work, including tools, machinery, equipment, appliances, supplies, scaffolding, and forms.

7.4. Survival of Assumptions. It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement shall survive any termination of this Agreement.

Section 8. Insurance.

Before commencing any work pursuant to this Agreement, TYO must obtain and maintain in force and effect insurance, at TYO's expense, covering all of the work and services TYO performs under this Agreement by TYO and each of its subcontractors.

8.1. Workers' Compensation. Such coverage must be as is required by the laws of the State of Pennsylvania but if optional under state law, the insurance must cover all employees anyway. **THE INSURANCE POLICY MUST CONTAIN A SPECIFIC WAIVER OF THE INSURANCE COMPANY'S SUBROGATION RIGHTS AGAINST ESPN.**

8.2. Commercial General Liability. This coverage shall include but not be limited to Bodily Injury, Personal Injury, Property Damage, and Contractual Liability, with coverage of at least five million dollars (\$5,000,000) per occurrence and ten million dollars (\$10,000,000) in the aggregate. Where explosion, collapse or underground hazards are involved, the X, C, and U exclusions must be removed from the policy.

8.3. Automobile Liability Insurance. This coverage shall include bodily injury and property damage, with coverage of at least one million dollars (\$1,000,000) combined single limit or the equivalent.

8.4. Placement of Insurance. All insurance shall be placed with insurance companies licensed to do business in the State of Pennsylvania and with a current Best's Insurance Guide Rating of A and Class X or better.

8.5. Work within Fifty Feet of Railroad Track. If any work is to be performed within fifty (50) feet of a railroad track, then the insurance must provide for coverage of incidents occurring within fifty (50) feet of a railroad track and any provision to the contrary in the insurance policy must be specifically deleted.

8.6. Railroad as Named Insured Party. TYO shall maintain the insurance required in this Agreement from the time this Agreement is executed until three years after the completion of the work. In all cases, the certificate of insurance must specifically state that the ESPN will be shown as an additional insured on TYO's policies during the time it is performing the work provided for in this Agreement and for a period of three (3) years after the completion of the work. Any coverage afforded ESPN as an additional, named insured shall apply as primary and not excess to any insurance issued in the name of ESPN. ESPN shall not be added as an additional insured to TYO's Workers' Compensation coverages.

8.7. Certificates of Insurance. Before commencing any work under this Agreement, TYO shall furnish to ESPN Certificates of Insurance evidencing the issuance to TYO of the policies of insurance providing the types of insurance and limits of liability prescribed above. TYO shall also certify that ESPN shall be given not less than thirty (30) days' written notice prior to any material change, substitution or cancellation prior to the normal expiration of any of said policies of insurance. Cancellation or expiration of any of said policies of insurance shall not preclude ESPN from recovery

thereunder for any liability arising under this Agreement, nor shall the amount of such insurance limit the recovery of ESPN.

Section 9. Railroad's Right to Perform Work, Stop Work or Terminate Agreement.

9.1. Suspension of Work by TYO. TYO shall not suspend the salvage of the Line without the written permission of ESPN's President. If salvage work is so suspended, TYO may only recommence said work with the written permission of the President.

9.2. Remedy for Improper Work. If ESPN's President reasonably determines that TYO is not performing the salvage work in accordance with this Agreement or is not reasonably progressing with the work as fast as necessary to ensure its completion as required by this Agreement or is otherwise violating any of the provisions of this Agreement, he shall notify TYO in writing to remedy such improper work or to otherwise comply with the provisions of this Agreement. If on the expiration of fourteen (14) days (or immediately in the event of lack of insurance, a safety violation, environmental problem or other violation of the law) after the serving of such written notice upon TYO or within such additional time as shall be specified in the notice, TYO shall continue to neglect the work or fail to remedy any specified deficiencies, ESPN may terminate this Agreement by written notice to TYO and may take possession of the work and of all materials, tool, and appliances thereon, and employ such means as may be necessary to finish the work. TYO is liable for any damage to ESPN resulting from TYO's refusal or failure to complete the work within the specified time, whether ESPN terminates TYO's right to proceed with the work. The rights and remedies of ESPN in this Section are in addition to any other rights and remedies provided by law or under this Agreement.

9.3. Bankruptcy. If TYO is the subject of any case under federal bankruptcy laws or makes a general assignment for the benefit of creditors or if a receiver is appointed for TYO, ESPN may, without prejudice to any other right or remedy it may have, by giving TYO or the receiver or the trustee in bankruptcy written notice, terminate the Agreement.

9.4. Survival of Obligations. TYO's obligation under the Agreement as to quality, correction, and warranty of the work performed by it up to the time of termination shall continue in force for a period of one (1) year after completion of the work.

10. Materialman's and Mechanic's Liens.

TYO shall promptly pay or cause to be paid all subcontractors and persons furnishing labor, services, articles or other materials for the work whether pursuant to an agreement with TYO or any subcontractor and shall deliver the work free from any claims or liens. At the time the salvage work is completed, TYO shall provide ESPN's President a notarized waiver of lien incorporated by this reference, as evidence that the work is free and clear from all liens for labor and materials, and that no claim then exists for which any lien could be filed or enforced.

11. Governing Law.

This Agreement shall be construed and enforced under the laws of the State of Pennsylvania and any action brought by either Party against the other shall be brought in a court in Pennsylvania with competent jurisdiction.

12. Disputes.

12.1. Differences Concerning the Agreement. Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled pursuant to this Section. During the pendency of the dispute resolution, TYO shall proceed with the work in accordance with reasonable instructions from ESPN's President unless continuation of the work is the matter that is in dispute, in which case TYO shall cease work as may be directed by ESPN's President.

12.2. Method of Resolution. The parties will attempt in good faith to resolve through negotiations any dispute, claim or controversy arising out of or relating to this Agreement. Either party may initiate negotiations by providing written notice to the other party setting forth the subject of the dispute, a detailed statement of its position regarding the dispute, or the relief requested. The recipient of the notice shall respond within seven (7) calendar days of receipt of the notice with a detailed statement of its position on and recommended solution to the dispute. If the dispute is not resolved by this exchange of correspondence, then representatives of each party with full settlement authority will meet at a mutually agreeable time and place within thirty (30) days of a notice that the initial step did not resolve the dispute in order to exchange relevant information and attempt to resolve the dispute. If the dispute is not resolved pursuant to these negotiations, the matter will be submitted to a panel of arbitrators for arbitration. ESPN shall select one member of the panel, TYO will select the second member of the panel, and those two shall select the third member of the panel. The third member selected must be someone with expertise in the area of dispute. Any dispute, claim or controversy arising out of or related to this Agreement or the breach, termination, enforcement, interpretation or validity of it, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined through arbitration in accordance with the laws of the State of Pennsylvania in an arbitration proceeding to be held at a mutually agreeable site in the greater eastern Pennsylvania geographic area. Judgment may be entered in any court having jurisdiction. Each Party shall bear its own costs for its arbitrator and share equally the costs of the third arbitrator.

13. Inspections.

13.1. Inspection of Work by ESPN. ESPN and its authorized representatives shall have the right at any time to inspect all aspects of the work to be performed by TYO pursuant to this Agreement prior to acceptance. Any such inspection shall be for the sole benefit of ESPN and shall not relieve TYO of the responsibility of ensuring that the work strictly complies with the contractual requirements of this Agreement. No inspection by ESPN or its authorized representatives shall be construed as an acceptance. Inspections shall not relieve TYO of responsibility for damage to, or loss of, the material prior to acceptance nor shall it affect the continuing rights of ESPN after acceptance of the completed work.

13.2. Correction of Work. TYO shall promptly correct all work rejected by ESPN as failing to conform to the Agreement whether detected before or after completion unless ESPN consents to accept such work. TYO shall bear all costs for correcting rejected work. If TYO fails promptly to correct rejected work, ESPN may by contract or otherwise, correct such work and charge TYO for any costs arising the correction.

13.3. Acceptance of Work. Acceptance by ESPN of the work performed by TYO pursuant to this Agreement shall be made as promptly as practicable after TYO notifies ESPN it has completed the work.

14.0 Protection of Persons or Property.

14.1. Use Care and Vigilance. TYO shall use care and diligence to avoid injury to persons or property whenever it performs work under this Agreement. Whenever local conditions, laws or ordinances require, TYO shall furnish and maintain such passageways, guard fences, lights, and other facilities and means for protection as may be required without expense to ESPN.

14.2. Precautions for the Safety of Personnel. TYO shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the work it performs pursuant to this Agreement. TYO shall also take all reasonable precautions for the safety of and shall provide all reasonable protection to prevent damage, injury or loss to all employees involved in its provision of any work, all the work provided, all materials and equipment to be incorporated in any work and other property at the premises or adjacent to the premises.

14.3 Personal Protective Equipment. The employees of TYO shall be suitably dressed to perform their duties safely and in a manner that will not interfere with their vision, hearing or free use of their hands and feet. Only waist length shirts with sleeves and trousers that cover the entire leg may be worn. The employees shall wear sturdy and protective footwear. All employees must wear protective head gear that meets the American National Standard Z89.1 in its latest version; eye protection that meets the American National Standard for occupational eye and face protection, Z87.1-1, in its latest version (additional eye protection must be provided to meet specific job situations); hearing protection that affords enough attenuation to give protection from noise levels on the job site(s); and audible back-up warning devices for all heavy equipment used by TYO on the job site(s).

14.4. Other Safety Requirements. In addition to the overall safety measures to be observed by TYO, it will also keep the job site(s) free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job. TYO shall have proper first aid supplies available on the job site(s) so that proper and prompt first aid may be provided to any employee or other person who is injured on the job site(s). TYO must immediately notify ESPN of any United States Occupational Safety and Health Administration reportable injuries occurring to any person that may arise during the work performed on the job site(s). TYO shall be responsible to ensure that its employees, while on the job site(s) or any other property of ESPN, shall not use, be under the influence of or have in their possession any alcoholic beverages or illegally obtained drug, narcotic or other substance.

14.5. Access to Premises. TYO is authorized to enter ESPN's property during daylight hours to perform services to be rendered under this Agreement. In the event of emergencies or any other requirement for TYO's services other than during regular business hours, arrangements to enter ESPN's property must be made through ESPN. TYO shall comply with federal, state, and local safety rules and regulations while on ESPN property and while performing services under this Agreement.

15. Protection of the Environment.

TYO shall ensure that all its activities in the work it does pursuant to this Agreement are conducted in such a way as to have the least possible adverse effect on the environment. TYO shall comply with all federal, state, and local laws, regulations, rules, ordinances or governmental directives regarding hazardous materials and protection of the environment, including but not limited to the Comprehensive Environmental Response Compensation and Liability Act of 1980 (as amended), the Resource and Conservation and Recovery Act, the Federal Water Pollution Control Act, the Clean Water Act, and the Clean Air Act. TYO shall only use licensed facilities when disposing of materials related to the performance of TYO's duties and obligations pursuant to this Agreement. With the exception of the ties, ESPN states that to the best of its knowledge the Assets do not contain nor are they contaminated by any hazardous materials.

16. Clean-up of the Work Sites.

TYO shall maintain the work site(s) and ESPN's property in a neat and tidy condition and free from the accumulation of waste products and debris, other than that caused by ESPN or unrelated third party. TYO shall not permit any products used in conducting the work or fluids, to be discharged or spilled on the site(s) or on any adjacent lands, streams, rivers, ponds, sewers or any similar place. TYO shall remove from ESPN's property all temporary structures, rubbish, and waste materials resulting from the contract operations and shall remove from ESPN property all equipment, tools, materials, and supplies not needed whenever directed by ESPN, all at no cost to ESPN.

17. Nondiscrimination.

TYO shall comply with Title VI and Title VII of the Civil Rights Act of 1964, as amended and all regulations promulgated thereunder; the Americans with Disabilities Act of 1990 and other applicable state and federal laws relating to discrimination in employment.

18. Severability.

If any provision of this Agreement or any remedy provided for is found to be invalid under any applicable law, such provision shall be inapplicable and deemed omitted. The remaining provisions shall remain in effect by giving effect to all other provisions or portions of provisions.

19. Successors and Assigns.

TYO shall not assign this Agreement or any portion of it without the prior written agreement of ESPN. A condition of any such agreement shall be that the assignee will agree to be bound by the terms and conditions of this Agreement. This Agreement shall be binding on the heirs, legal representatives,

successors, and assigns of TYO and shall inure to the benefit of the successors and assigns of ESPN which approval shall not be unreasonably withheld.

20. Miscellaneous Provisions.

20.1 Service of Notice. All notices provided for in this Agreement shall be in writing and shall be served by depositing the notice in first class mail, postage prepaid or by sending the notice by prepaid overnight courier service or via facsimile followed by mailing said notice via first class mail, postage prepaid, to the following addresses:

If to The Tie Yard of Omaha:
8202 "F" Street
Omaha, NE 68127
Facsimile Number: (402) 339-4965
Attn: Terry Peterson

If to ESPN:
505 South Broad Street
Kennett Square, Pennsylvania 19348
Facsimile Number: (610) 925-0135
Attn: Bob Parker

or to such other person or address of which one Party might subsequently notify the other of in writing from time to time.

20.2. Rights and Remedies. The duties and obligations imposed by this Agreement and the rights and remedies available under it shall be in addition to and not a limitation of any duties, obligations, rights, and remedies otherwise imposed or available at law.

20.3. Relationship. The Parties are not employer and employee and nothing in this Agreement shall be construed as creating such a relationship between TYO and ESPN. Subject to the provisions of this Agreement, TYO may adopt such arrangements as it may desire regarding the details of the work it is to perform pursuant to this Agreement as well as the personnel to be hired to do the work. Whatever arrangements TYO adopts must, however, be consistent with the achievement of the result contracted for within the time agreed upon in this Agreement. In no event shall ESPN be required to make deductions from compensation or report earnings of employees of TYO under the Social Security Act or any other federal or state law purporting to levy a tax on the payrolls or the compensation of employees. TYO agrees to indemnify and save ESPN harmless from any and all liability, cost or expense under any such law.

20.4 Subcontractors. TYO may, with the written permission of ESPN, subcontract out portions of the work to be performed under this Agreement so long as it preserves and protects the rights of ESPN contained in this Agreement. Such contracts or written agreements with subcontractors shall require them to perform their part of the work in accordance with and subject to the terms and conditions of this Agreement. TYO shall be fully responsible to ESPN for the acts and omissions of subcontractors and of persons employed by them in the same manner in which TYO is responsible under this Agreement for acts and omissions of persons directly employed by it. Thus, TYO agrees that it shall incorporate the terms and conditions of this Agreement into all subcontract agreements into which it enters with subcontractors. No such contract shall release or relieve TYO from any obligation under this Agreement and TYO shall be as fully responsible to ESPN for the acts and omissions of any and all subcontractors and of any persons either directly or indirectly employed by them as if such acts and omissions were the acts and omissions of TYO or of persons directly employed by TYO. TYO shall provide ESPN with

copies of all subcontractor agreements entered into between TYO and its subcontractors. Each subcontractor agreement may be assigned by TYO to ESPN, provided that (i) assignment is effective only after termination of this Agreement by ESPN for cause and only for those subcontract agreements that ESPN accepts by notifying the subcontractor and TYO in writing and (ii) the assignment is subject to the prior rights of the surety, if any, obligated under any bond relating to this Agreement (iii) approval of subcontractor agreements will not be unreasonably withheld.

21. Entire Agreement; Waiver.

This instrument constitutes the entire agreement between the parties and supersedes all other agreements and understandings, both written and oral, between the parties respecting the subject matter of this Agreement. Nothing in this Agreement shall be construed to constitute a waiver by either party of any rights, duties or causes of action that may arise out of this Agreement.

22. Third Party Beneficiaries.

This Agreement is not intended to and shall not be deemed to be for the benefit of any person or entity not a party to this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

THE TIE YARD OF OMAHA

By: 

Its: PRESIDENT

EAST PENN RAILROAD, L.L.C.

By: 


Its: PRESIDENT

APPENDIX A

Contractor will take up, remove, and dispose of the track and track materials on the line segments listed in Section 1.1 of the Agreement to which this Exhibit A is attached. ESPN assumes no responsibility or liability for the correctness, adequacy or variation from the quantities shown in the Agreement and actual quantities as determined by measurement. All materials are sold "as-is, where-is" and no warranty, either expressed or implied, is given by ESPN regarding the quality, condition, use or re-use of the materials.


Contractor shall adhere to the following specifications while undertaking the salvage operations:


1. Contractor shall take ample precautions in protecting all existing structures, improvements, and utilities that may be encountered, and shall be liable for any damages resulting from its operations.
2. All existing right-of-way fences shall remain in place and all waterways shall be kept clear.
3. Contractor shall not enter private property adjacent to ESPN's right-of-way without obtaining permission of the owner.
4. Contractor shall have the sole responsibility for providing, installing, moving, replacing, maintaining, cleaning and removing upon completion of work, all barricades, warning signs, barriers, cones, lights, signals, and other such type devices as shown in the Manual on Uniform Traffic Control Devices or required by the appropriate Municipality.
5. Contractor shall take all necessary precautions in handling ties that have been treated with creosote. There will be no burning or burial of ties or debris on ESPN property.
6. Contractor shall conduct all salvage operations to avoid affecting natural drainage.
7. All public road crossings shall be reconstructed comparable to adjacent road construction as per the requirements of the governmental agency responsible for the roadway. All public road crossings shall be removed in accordance with the requirements of the governmental agency that maintains the road.
8. No wooden boxes, stone or concrete culverts or arches or cast iron or concrete pipe or bridges now in place, are to be removed.
9. Contractor shall remove all signs such as whistle posts, road crossing signs or station signs.


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10. Contractor shall remove and dispose of the salvaged materials in conformity with all state and federal environmental and regulatory statutes, regulations and rules. The Contractor shall adhere to any and all conditions of the Surface Transportation Board ruling on the Abandonment. The Railroad's right-of-way shall be left in a condition satisfactory to ESPN.


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